Office
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 935

BOOMHOWER, INC.,
Petitioner,

vs.

H. G. FISCHER & CO., INC., and
ALAN MATHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THADDEUS G. BENTON,
77 Park Avenue,
New York, New York,
Counsel to Petitioner.

W. M. KETCHUM,
Suite 621, 175 W. Jackson Boulevard,
Chicago, Illinois,

S. T. SUTTON,
30 N. La Salle Street,
Chicago, Illinois,
Of Counsel.

INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statement of the Case 3
Facts found by Court of Appeals 4
Grossly erroneous legal conclusions by Court below 10
Additional facts, not mentioned by the Court of Appeals but proved unmistakably by the evidence 11
Reasons for the Allowance of the Writ 16

Argument—

I. The Legal Conclusion That There Is No Evidence That Defendants Breached Their Contractual Obligation to Petitioner Is Contradictory of All the Facts So Clearly Found by the Court of Appeals; and It Is Erroneous, Incredible, Inexplicable, and Untrue 16

II. The Legal Conclusion That There Is No Showing That Defendants Interfered with Raney's Contractual Commitment to Petitioner or That Defendants Knew Anything About the Terms of Such Agreement, Is Erroneous, Incredible, Inexplicable, and Untrue, As Shown by the Facts 18

III. The Court's Holding That the Suit Was Brought Against the Wrong People, Instead of Against Raney, Is Palpable Error 20

IV. Having Conspired with Petitioner's Fiduciary, Raney, in His Attempted Embezzlement of Petitioner's Property, Defendants Are Liable for Petitioner's Losses 22

Conclusion 23

Appendix—

Decision of Court of Appeals A1

DECISIONS CITED

Ashman v. *Miller*, 101 F. 2d 85 22
Boomhower, Inc., v. *Fischer et al.*, 251 F. 2d 611 ..... 2, A1
Columbia Law Review, Vol. XXX, Feb., 1930, No. 2, p. 236, p. 237, p. 239 21
Corpus Juris Sec., Vol. 15, pp. 996, 1004 22
Corpus Juris Sec., Vol. 17, Sec. 155, p. 508 17
Corpus Juris Sec., Vol. 17, Sec. 198, p. 550 19
Corpus Juris Sec., Vol. 17, Sec. 328 18
Crites v. *The Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356 22
Duane Jones Co. v. *Burke*, 121 N. Y. S. 2d 107 (1953) 22
French, Hiram M., v. *Assyria Hall*, 119 U. S. 152, 30 L. Ed. 375 (1886) 23
Hays v. *Borders*, 6 Ill. 46, 65 (1844) 21
Hornstein v. *Podwitz*, 254 N. Y. 443, 173 N. E. 674 20
Irving Trust Co. v. *Deutsch*, 73 F. 2d 121, cert. denied 294 U. S. 709 22
Jackson v. *Smith*, 254 U. S. 586, 65 L. Ed. 418 22
Kernan v. *Humble*, (La. 1899) 25 So. 431 22
Kervozky v. *Lorber*, 290 N. Y. 279, 49 N. E. 2d 146, 147 20
Meinhard v. *Salmon*, 249 N. Y. 458, 463 22
Moser, Louis C., & Co., Inc., v. *Kreger*, 80 N. Y. S. 2d 199 20
Pratt v. *Shell Petroleum Corp.*, 100 F. 2d 835, 22 F. Supp. 304 22
Rosenberg v. *Weisberger et al.*, 200 Misc. 198, 108 N. Y. S. 2d 962 20
Robert Music Corp. v. *Alamo Music, Inc.*, 119 F. Supp. 29 (S. D. N. Y.) 21
Russell v. *Post*, 138 U. S. 425, 34 L. Ed. 1009 22
Simon v. *Noma Electric Corp.*, 293 N. Y. 171, 56 N. E. 2d 537 20
Woodenware Co. v. *U. S.*, 186 U. S. 279, 46 L. Ed. 1164 22

STATUTES CITED

Title 28, U. S. C., Sec. 1332 3
Title 28, U. S. C., Secs. 2101 (c) and 1254 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. .....

BOOMHOWER, INC.,
Petitioner,

vs.

H. G. FISCHER & CO., INC., and
ALAN MATHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above action January 24, 1958, affirming the judgment of the United States District Court for the Northern District of Illinois finding for the defendants upon defendants' motion for judgment at the close of plaintiff's case.

OPINIONS BELOW.

The opinion of the District Court is not reported in Federal Supplement, but appears at pages 5-7 of Petitioner's separate appendix. The opinion of the United States Court of Appeals appears in 251 F. 2d p. 611 (See at Appendix hereto, p. A1).

JURISDICTION.

The judgment of the United States Court of Appeals is dated and was entered on January 24, 1958. The order of the United States Court of Appeals denying petitioner's petition for rehearing is dated February 20, 1958, and simply reads: "It is ordered by the court that the petition for rehearing of this cause be, and the same is hereby denied."

Section 2101 (c) and Section 1254 of Title 28, U. S. C. are believed to confer jurisdiction on this court to review the judgment by writ of certiorari.

QUESTIONS PRESENTED.

1. Whether the courts below totally ignored controlling principles of law and equity that properly fasten liability upon defendants, as manufacturers, for (a) the breach of their contractual undertaking with petitioner to give "ALL POSSIBLE SUPPORT AND COOPERATION" to petitioner as their exclusive franchise dealer in Washington, D. C., Virginia and Maryland, by aiding and encouraging petitioner's vice president, manager and fiduciary to embezzle petitioner's said franchise, and to sabotage and appropriate petitioner's employees; and for (b) aiding and

encouraging the breach by petitioner's vice president and fiduciary of his contract obligation to serve petitioner as its vice president-manager on a profit sharing basis for three years—all with the result that plaintiff's business was ruined?

2. Whether the decisions of the courts below were controlled erroneously by philosophical and psychological considerations, and not by law and equity?

3. Whether the legal conclusions of the Court of Appeals are grossly contradictory of the facts found by the court, and in disregard of fundamental law?

Petitioner most sincerely urges that every principle of law, equity and morality compels an affirmative answer, and that the decision below is a travesty upon justice, as shall be shown by the facts, as found by the Court of Appeals.

STATEMENT OF THE CASE.

Petitioner, a Delaware corporation, sued the respondent H. G. Fischer & Co., Inc., an Illinois corporation, and its president Mathis, a resident of Illinois, in the United States District Court for the Northern District of Illinois, for damages for breach of contract and for iliegal interference with petitioner's contract with its vice presid[illegible], one Raney.

Jurisdiction of the court was unquestioned, based on Section 1332, Title 28, U. S. C.

Petitioner seeks to recover $36,592 as damages under three separate and alternative causes of action. The first charges defendants, manufacturers, with having breached their contract with petitioner as their distributor and sales agent to lend petitioner ALL POSSIBLE SUPPORT AND COOPERATION in its representation of them, by conniv-

ing with its vice president Raney in his purpose to embezzle its franchise with defendants. The second charges that defendants maliciously interfered with Raney's three-year contract of employment as petitioner's vice president and manager. The third cause is trespass on the case charging that defendants conspired with plaintiff's fiduciary, Raney, to take away its property rights under its contracts with defendants, and give them to Raney.

As the essential facts found by the Court of Appeals (although incomplete) prove the basic allegations of the complaint, and require affirmative answers to the legal questions presented, there is no need to review the allegations of the complaint (Pl's separate App. p. 8; amended complaint, R. 37).

Facts Found by Court of Appeals.

Respondent H. G. Fischer & Co. (hereinafter called "Fischer") manufactures medical equipment. Respondent Mathis is its president.

Petitioner was organized in October, 1950, by T. G. Benton, a lawyer, to acquire, and did acquire, the business and assets of D. W. Boomhower who had acted as exclusive sales representative of Fischer in the distribution and servicing of its products in Washington, D. C., and most parts of Virginia and Maryland. T. G. Benton became president, and one Ed M. Raney and D. W. Boomhower vice presidents. Benton was without experience in this business, and placed Raney "in full charge of petitioner's operations".

D. W. Boomhower as vice president of petitioner informed Fischer by letter to Mathis of October 6, 1950, of petitioner's organization and its purchase of his business, and supplied the names of its officers, stating that "*Raney would remain in full charge of the business*", and "requesting Fischer to write plaintiff assuring it of the continuation of 'our sales franchise with you and your continued *sup-*

port and cooperation'". By a second letter, Fischer was requested to assure petitioner of the same dealer and cash discounts as under the former ownership, and that future advertising sent out by Fischer for this territory be under plaintiff's name (Ptr's. separate App. pp. 14-17).

October 12, 1950, Fischer by Mathis acknowledged those two letters, offered petitioner its congratulations and best wishes for success, and stated that they "certainly expect to extend to Boomhower, Inc., *all possible support and cooperation* and extend to them the same discounts and terms that we have extended to D. W. Boomhower Co." (Ptr's. separate App. p. 18). On the strength of that exchange of correspondence petitioner and respondents "continued the supplier-dealer arrangement" that previously existed with D. W. Boomhower.

In March, 1951, Raney wrote defendants from his residence address, clandestinely, asking defendants to "consider this letter and its contents completely confidential." He referred to a conversation he had had with Mathis when in Chicago on petitioner's business in January, 1951, in which Raney intimated that the petitioner's situation might not be entirely satisfactory and had inquired about the possibility of his taking over the Fischer franchise exclusively in the Washington, D. C., area. He informed defendants that Mr. Benton had no conception of the business and had created dissension among salesmen. He noted that he foresaw a complete disintegration of the sales organization, and that he could take a key salesman or two from petitioner and double the Fischer business in that area. He advised that he had capital available to handle the franchise in that area and "can carry on in exactly the same manner as we have in the past." He asked defendants: "Knowing you as I do, Alan, and your sense of loyalty I will ask a straight question. *Will you let me have this territory ex-*

clusively on my own and take it away from this arrangement as of the present? Please advise me at my home address above." (Ptr's. separate App. p. 18).

That letter evidenced to defendants the complete and unqualified criminal purpose of Raney to embezzle his employer's rights, and his total infidelity. Such perfidy was first expressed in January, 1951—four months after becoming petitioner's vice president under a three year contract on a profit sharing basis.

The letter was perfect notice to defendants of Raney's criminal purposes to embezzle his employer's property rights.

Defendants replied to Raney's letter of March, by letter of March 27, 1951, addressed clandestinely to Raney's residence address, thus joining Raney in his clandestine purposes. They informed Raney that "If, as you state in your recent letter, it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as a proper sales force for our line and you feel that you can take over our line advantageously *yourself, we, of course, are agreeable to turning our representation over to you.* * * *". As hereinafter shown, defendants never attempted to confirm any possible disintegration of petitioner, but unconditionally promised the franchise to Raney.

Defendants then outlined the exclusive territory they would give Raney, being substantially the same as then possessed by petitioner. The letter concluded:

> "*Our offering* the above territory to you and *offering you* our line, also your retention of the territory, would be predicated upon your handling no items that would be competitive to ours and getting what we would consider a satisfactory and representative volume of business from the territory.

> *"We will be ready to proceed along the lines under discussion when we have heard further from you."* (Ptr's. separate App. p. 19).

That letter evidences the unqualified offering of petitioner's franchise to petitioner's vice president, Raney.

Raney, again from his residence address and clandestinely, replied by letter of March 31, 1951, stating that *"I am ready to move"*, *that he could retain certain of petitioner's salesmen*, and that:

> "How much time will you require to notify Boomhower, Inc.—which is only fair—of the cancellation of their franchise? *I certainly do not wish it to be said at any time that there was any 'schullduggery' (sic) in the transaction."* (Ptr's. separate App. p. 21).

That letter registered deep conviction by Raney and further notice to defendants that he was engaged in an illegal purpose, and was further, express notice to defendants of the fact that Raney was appropriating to his own use petitioner's property rights, with the full aid and affirmative cooperation of defendants.

April 1, 1951, Raney wrote D. W. Boomhower in Florida, again from his clandestine residential address, expressing a hostile attitude toward Mr. Benton, and asking for $5,000 capital for a new corporation Raney proposed to form and *"personally control to take over the Fischer business from plaintiff."* He informed D. W. Boomhower that *he could take all petitioner's employees with him.* D. W. Boomhower declined to participate (Ptr's. separate App. p. 25).

On April 4, 1951, petitioner's president Mr. Benton, having learned of Raney's purposes to embezzle its franchise, by the "squealing" by Kane (Raney's confederate), demanded that he "turn in his keys", but he did not resign

until April 11, 1951. Petitioner's employe Kane had "squealed" on Raney, after having conspired with him to finance him in his enjoyment of petitioner's franchise. Petitioner had demanded that Raney exhibit his clandestine correspondence with defendants which he refused to do (Raney, Tr. pp. 96, 175, 202-3, 210).

The next day, April 5, 1951, Raney again wrote defendants from his residence stating that "This affair has become an open brawl!", that defendants would receive a letter from Mr. Benton stating his "side of things", impugning Kane who had "squealed" on him, and declaring:

> "Ordinarily, Alan, I would not stoop to levelling on a man, but in this case he (Kane) and Benton feel that they can put one over on Pappy but he has lived too long for that.
>
> "Knowing you to be an honorable man, Alan, *I am going to ask you to respect* ALL OUR CORRESPONDENCE AS CONFIDENTIAL AND NOT OPEN TO THE SCRUTINY OF OTHERS. IF BENTON REQUESTS COPIES PLEASE CONSIDER THE CONFIDENTIAL NATURE OF MY LETTERS—AT LEAST —AND REFUSE HIM.
>
> "Holah was in today and will carry on but not with the Kane-Benton combination.
>
> "My reason for all of the foregoing is that I worked under a profit sharing arrangement and I do not propose to let him in his sly legal way try to chisel me out of any just earnings on a technicality." (Ptr's. separate App. p. 22).

(Instead of being entitled to a share in the profits, because they were non-existent, Raney had failed even to earn his drawing account at the rate of $6500 per year, as required by his contract with petitioner. Rickman's deposition, pp. 13-18, Rickman's Ex. 15.)

Such letter is a complete confession of Raney's perfidy, his infidelity, his criminal purposes, and his confirmation to defendants of such illegal purposes. And defendants persevered in their purpose to give the franchise to Raney, and take it away from petitioner, in violation of their contract, and in violation of their duty not to interfere with petitioner's contract rights with Raney.

> (That letter to defendants proves unmistakably the gross error of the court in concluding that "There is no showing * * * that defendants even knew anything about the terms" of Raney's agreement with petitioner. And Mathis freely admitted his knowledge, in early April, a least, of Raney's interest in petitioner's profits, and he had been informed in October 1950, that he was the vice president of petitioner, and in full charge of the business (Tr. 37). And Raney freely confessed that Mathis knew the arrangements he had with petitioner (Ex. 54, pp. 90-92).)

With all such knowledge, defendants by further letter to Raney of April 9, 1951, again addressed to his residence clandestinely, confirmed their offer of petitioner's franchise to Raney and stating that "About one month's notice to Boomhower, Inc. would be required." (Ptr's. separate App. p. 24).

The foregoing is proof positive of defendant's conspiracy with petitioner's vice president and fiduciary to enable Raney to embezzle petitioner's franchise, and to appropriate to his own use petitioner's employees.

Raney was unable to raise the capital required to organize his proposed dealer corporation, because of his breach with Kane, and Kane's "squealing" on his purposes, and his inability to induce D. W. Boomhower to help him; and, as a consequence, Fischer could not conclude its purpose to give him petitioner's franchise (the reasons being hereinafter shown). (But the harm had been done to peti-

tioner's business, and its ruination was a direct result of all that defendants did with Raney.)

Raney was obliged to resign on April 11, 1951, and he then went to work for Fischer as an assistant to Mathis.

Dennis Kane (who had squealed on Raney) succeeded Raney as a petitioner's vice president, without knowledge by petitioner that he too had been engaged in Raney's illegal purposes. He remained only until late July, 1951, when his dishonesty was disclosed. Kane was followed in order by two of petitioner's salesmen, and none was successful.

Petitioner continued to represent Fischer (except that as a direct consequence of Raney's illegal purposes a Virginia representative was able to acquire from Fischer the franchise to sell its products in Virginia, which franchise was taken away from petitioner), and as of October 5, 1951, the parties executed a formal contract covering the remaining territory. Fischer cancelled that contract on April 25, 1952, and gave the franchise to District X-Ray Co. headed by Kane and others.

Grossly Erroneous Legal Conclusions by Court Below.

Despite such facts so freely found by the Court of Appeals, that alone show conclusively the liability of defendants, the court committed the most startling, erroneous conclusions, that, as a matter of law, the evidence was insufficient to sustain petitioner on any of its theories, that there was "no evidence that defendants breached any of their contractual obligations to plaintiff as defined in the October, 1950, exchange of letters or as formally set out in the contract of October, 1951", that "there is no showing that defendants interfered with Raney's contractual employment with plaintiff, or that defendants ever knew anything about the terms of any such agreement", that "we

find no evidence of any conspiracy between defendants and Raney to enable Raney to embezzle plaintiff's franchise and steal plaintiff's employees", and that petitioner brought the suit against "the wrong people", meaning that it should have been brought against Raney alone—a fallacy.

Such conclusions are gross contradictions of the plain facts found by the court, and could not be sustained even if philosophy and psychology were the test of actional wrongs, instead of the exclusive legal and equitable principles that control. Morality alone compels the opposite conclusions.

Additional Facts, Not Mentioned by the Court of Appeals but Proved Unmistakably by the Evidence.

While the foregoing facts found by the Court of Appeals prove abundantly the actionable wrongs as matter of law, the following additional facts (not mentioned by the court, but not disputed) confirm beyond possibility of doubt the actionable wrongs by defendants, and the gross errors of law by the Court of Appeals:

Defendants knew full well from all the above described correspondence with Raney that Raney was petitioner's trusted vice president, manager, and fiduciary; and Raney had testified in another action that respondent Mathis knew substantially the arrangements he had made with petitioner (Ex. 54, pp. 90-92). Defendants knew that Raney had been engaged for a three-year term as petitioner's vice president and manager with an interest in the profits of the business, and Mathis had stated to petitioner that it could rely on Raney (Tr. p. 185; Ptr's. separate App. p. 23).

The Fischer products represented a substantial portion of petitioner's business (Tr. p. 172) and was the most important line of merchandise petitioner sold, and the loss of any

part of the franchise would certainly have been detrimental to the business (Brown dep., pp. 31-34).

Defendants' undertaking to give petitioner "ALL POSSIBLE SUPPORT AND COOPERATION" was in return for the reciprocal undertaking of petitioner to sell defendants' equipment, to service it (including the Fischer products already sold in the area), and to take care of physicians in the area in manner as would be a credit to all parties, all at petitioner's expense (Tr. pp. 17-18), so that there was ample consideration for defendants' contract with petitioner.

Raney had testified in another action that Mathis "ALSO TENDERED TO ME VOLUNTARILY, if I was leaving Boomhower, how about considering the Washington territory?" (Ex. 54, pp. 24-25, 37-38, 94). So that defendants were a guiding spark in Raney's infidelity.

Raney had conspired with Kane, for Kane to supply the capital for the operation of the franchise when Raney should acquire it (Ex. 55, pp. 75, 104, Ex. 54, pp. 26-27, Tr. pp. 93-96, 142); but Kane squealed on Raney's illegal purpose (Ex. 55, pp. 105, 108-9).

In March, 1951, Raney, well knowing that petitioner had engaged one Lox of Virginia as a salesman (Lox dep.; Tr. p. 190; Ex. 54, pp. 45-46, 127), informed Lox, in violation of his fiduciary duty to petitioner, that petitioner was not in good shape and would soon fold-up or go broke, that Raney could presently obtain the Fischer franchise and had been promised it, and asked Lox and his partner Otteson to go to work for him when he should obtain the Fischer franchise; whereupon Lox declined to comply with his promise to work for petitioner. Thereupon, with such knowledge that the Fischer franchise might be obtained by others, Lox and Otteson went to Chicago and obtained the Virginia franchise for themselves, reporting to Fischer the

alleged facts stated by Raney, in his effort to sabotage petitioner's employees. Defendants thereupon in April, 1951, with full knowledge of Raney's infidelity and without any inquiry of petitioner, took away from petitioner the Virginia franchise (Tr. pp. 48, 50, 91-2; Pl's. Ex. 46, Raney Tr. pp. 110-113). The Virginia business lost by petitioner represented one-fourth of petitioner's business (Brown dep. p. 37, Brown Ex. 37).

By letter of April 5, 1951, to defendants, petitioner, having learned of Raney's efforts to embezzle its franchise, informed defendants optimistically about its business in the first six months of its life, its efforts to aid its Virginia representatives Lox and Otteson, and inviting defendants' *cooperation*, striving to avoid the loss of its franchise. On the same date petitioner's president telephoned Mathis for the same purpose, but defendants did not mention their purpose to give its franchise to Raney or part of it to Lox and Otteson (Pl's. Ex. 36, Tr. pp. 32-3, 45, 188).

Mathis assumed full responsibility for the foregoing exchange of correspondence between defendants and Raney (Tr. p. 24).

Mathis' alibi that his determination to give petitioner's franchise to Raney was conditional upon the facts about petitioner as reported by Raney being true (Tr. pp. 39, 45, 62-63, 67) was manifestly false and incredible, for defendants never investigated or inquired about such facts and they did not know whether the forebodings of Raney about petitioner would transpire (Tr. pp. 25, 40, 43-44); and defendants had not received any complaint against petitioner (Tr. pp. 29-30). There was no evidence whatever that petitioner was mismanaging the business, and Mathis did not express any dissatisfaction whatever about defendants' relations with petitioner (Tr. p. 189).

Mathis testified that he paid "much attention" to the fact that his correspondence with Raney was addressed from and to Raney's residence (Tr. p. 21). He was thus fully conscious of Raney's infidelity at all times. He freely testified that he knew that Raney was seeking the Washington franchise for "HIS OWN PERSONAL USE" and *that Raney would take with him petitioner's employees* (Tr. pp. 26-28, 30-31).

The three clandestine letters by Raney to defendants did not bear defendants' usual time stamp of their receipt by defendants, thus showing defendants' purpose to regard them as unusual, secret and clandestine communications (Tr. pp. 33-34).

Despite Mathis' knowledge of Raney's wrongful purposes, and defendants' contract commitment to give petitioner "ALL POSSIBLE SUPPORT AND COOPERATION", Mathis had the audacity to deny that he was under obligation to inform petitioner of Raney's clandestine, criminal purposes to embezzle petitioner's franchise, in an obvious attempt to escape civil liability (Tr. p. 53).

Petitioner had been frantic for additional sales power, and the loss of important personnel or exclusive sales territory such as Virginia was extremely damaging to its business (Raney, Tr. pp. 118-119; Ex. 54, Raney, Tr. p. 126).

Raney, while found to be dishonest, was the ablest known person to manage petitioner's business, and his loss to petitioner because of his dishonesty led to the ruination of petitioner's business (Brown dep., pp. 29-30).

Following Mathis' last letter to Raney of April 9, 1951, he in Washington, D. C., sought to meet privately with Raney, and not with petitioner's president, thus concealing his aiding and abetting of Raney to embezzle the franchise (Tr. pp. 89-90, 213-214). But as Raney's co-conspirator

Kane, who had promised Raney the capital, had squealed on Raney, Raney was unable to take the franchise, and accepted a position in Chicago with defendants (Tr. pp. 144, 83). The net result of Raney's infidelity, was the immediate loss of the Virginia franchise, the loss of petitioner's valued employees, the ruination of petitioner's business, and its great damage. The Virginia franchise was lost in early April (coincident with Raney's departure), Raney's services were lost then, Kane's services were lost in July, 1951, and in early 1952 the remainder of the Fischer franchise was lost, all of which was the ruination of petitioner's business (Tr. pp. 183-4, 189-190).

Kane, while a co-conspirator with Raney to embezzle the franchise, had also conspired with Mathis for the procurement of the franchise for himself, in competition with Raney (Miller deposition).

Defendants cancelled petitioner's whole franchise April 25, 1952, and gave it to District X-Ray Company then organized and owned by Kane and petitioner's former service manager (Tr. p. 72), Mathis having sent Raney to Washington for that purpose (Tr. pp. 73-74, 108-110).

After losing Raney and Kane, and the Virginia franchise, petitioner endeavored to sell the business and reduce its losses (Tr. pp. 190-191, 195-6) and was required to sell the business to its only outlet, viz., Kane as its former vice president and co-conspirator with Raney.

Defendant Mathis declined to produce documents required by a *subpoena duces tecum*, and his counsel brazenly declared to the court that he "threw it away" in utter contempt of the process of the court, and without reprimand by the trial judge (Tr. pp. 233-236). If, therefore, it were true (which could not be) that there was insufficient evidence, it was due to the contempt of the court by Mathis, and the trial court's indulgence.

Accountant Rickman analyzed the losses of petitioner from October 2, 1950 through October 18, 1954, and testified that they were $36,592.75 (Rickman dep., pp. 18-27, 31, Exs. 16, 16A; Benton, Tr. p. 251).

The foregoing facts were conclusively proved by the evidence, and doubly confirm the actional wrongs committed by defendants as shown alone by the findings of facts by the Court of Appeals, whose legal conclusions are contradictory thereof.

REASONS FOR THE ALLOWANCE OF WRIT.

The decision below totally disregards fundamental principles of law and equity, and is based solely and erroneously on applied philosophy and psychology.

The decision below is repugnant to the controlling decisions of this court, and other United States Courts of Appeal, and established decisional law.

The Court of Appeals so far departed from the accepted and usual course of judicial proceedings, as to require the exercise of this court's power, to prevent a travesty upon justice.

ARGUMENT.

I. The Legal Conclusion That There Is No Evidence That Defendants Breached Their Contractual Obligations to Petitioner Is Contradictory of All the Facts So Clearly Found by the Court of Appeals; and It Is Erroneous, Incredible, Inexplicable, and Untrue.

Defendants' contractual obligation to give petitioner as its sales agent "ALL POSSIBLE SUPPORT AND CO-

OPERATION" is undisputed. Defendants' conniving clandestinely with petitioner's vice president-manager-fiduciary to enable him to embezzle petitioner's franchise and appropriate petitioner's employees violated that business obligation, and violated every moral concept known to man.

Defendants not only violated their contractual obligation to petitioner, but they were engaged in the perpetration of a fraud on petitioner, by their clandestine conduct and their failure to disclose Raney's purposes to petitioner under their obligation to give "all possible support and cooperation" to petitioner. The law is stated in 17 *Corpus Juris Sec.*, Sec. 155, Contracts, p. 508:

> "The rule that nondisclosure of facts does not constitute fraud does not apply where there is an active concealment of facts. *This is a fraud.*"

The dishonest actions of defendants in aiding and abetting Raney to embezzle petitioner's property, as evidenced conclusively by their correspondence, prove beyond a possibility of doubt the guilt of defendants in breaching their contract.

The court's conclusion that there is no evidence of such breach of contract is simply untrue and grossly erroneous.

So long as petitioner was discharging its contract with defendants, defendants owed petitioner under its obligation to give it "all possible support and cooperation" the implicit, reciprocal duty not to do anything that would hurt petitioner in the enjoyment of those rights. Defendants violated that contract with impunity, and participated with Raney in his fraudulent purposes.

Defendants' active participation in Raney's attempted embezzlement of petitioner's property was a merciless, immoral, and unconscionable violation of their contractual

obligation. 17 *Corpus Juris Sec.*, Sec. 328 on Contracts, states the rule:

> "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used, and terms which may be clearly implied from a consideration of the entire contract are as much a part thereof as tho plainly written on its face. In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract *to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract.*"

Instead of complying with their contract with petitioner, defendants actually supported and cooperated with Raney to betray his trust and to embezzle petitioner's property. That was an unconscionable breach of their contractual commitment to lend all possible support and cooperation to petitioner.

II. The Legal Conclusion That There Is No Showing That Defendants Interfered with Raney's Contractual Commitment to Petitioner or That Defendants Knew Anything About the Terms of Such Agreement, Is Erroneous, Incredible, Inexplicable, and Untrue, As Shown by the Facts.

Such legal conclusion is in direct contradiction of the sordid facts found by the court, as confirmed by the further facts not mentioned by the court, but proved by the uncontradicted evidence—all as hereinabove shown.

The facts above shown prove conclusively that defendants' breach of their contractual commitment to petitioner aided and abetted Raney and made possible his purposes

to embezzle petitioner's franchise, with full knowledge of Raney's fiduciary obligations to petitioner alone; and, except for defendants' cooperation with Raney, Raney could not have embarked upon such dishonest purposes.

The agreement of defendants to give petitioner's franchise to Raney was a common fraud upon petitioner, and was a malicious interference with petitioner's contract with Raney as its vice president. 17 *Corpus Juris Sec.*, Contracts, Sec. 198, p. 550, states the rule:

> "Contracts, the object or tendency of which *is to constitute a fraud or breach of trust or breach of duty* on the part of one who stands in a fiduciary or confidential relation, *are illegal and void*, as constituting or tending to constitute, a fraud on third persons."

As it was Raney's duty to petitioner to preserve and protect petitioner's franchise, which knowledge was conclusively chargeable to defendants, their agreement with Raney, during the term of their contract with petitioner and the term of Raney's with petitioner, to take the franchise from petitioner and give it to Raney was a brazen, unlawful, fraudulent and merciless interference with the Raney contract with petitioner, which directly caused the loss by petitioner of its contract rights with Raney.

Without defendants' willing aid, cooperation, clandestine involvement and commitment to Raney while he was petitioner's vice president and manager, it would have been impossible for Raney to perpetrate the embezzlement of petitioner's property and the sabotaging and attempted stealing of petitioner's employees. Defendants clandestinely gave Raney, instead of petitioner, their full cooperation and support in violation of their express, written contract with petitioner.

Such conduct was an illegal interference with petitioner's contract rights with Raney, and such conduct destroyed such contract.

All parties who wrongfully induce a breach of contract are jointly and severally liable, and malice does not necessarily mean actual malice "but the intentional doing of a wrong act without legal or social justification". Intentional interference is sufficient. *Hornstein* v. *Podwitz*, 254 N. Y. 443, 173 N. E. 674; *Kervozky* v. *Lorber*, 290 N. Y. 279, 49 N. E. 2d 146, 147. To recover against one tortiously inducing the breach of his contract, it is not necessary to show that the party breaching the contract is insolvent or could not otherwise respond to a judgment (as Raney is doubtlessly here unable to respond to a judgment); the liability is joint and several. *Simon* v. *Noma Electric Corp.*, 293 N. Y. 171, 56 N. E. 2d 537; *Rosenberg* v. *Weisberger et al.*, 200 Misc. 198, 108 N. Y. S. 2d 962; *Louis C. Moser & Co., Inc.*, v. *Kreger*, 80 N. Y. S. 2d 199. Petitioner is not limited in the assertion of its rights as against the contract breaker Raney, for all parties who induced the breach of contract are jointly and severally liable. *Hornstein* v. *Podwitz*, 254 N. Y. 443, 173 N. E. 674.

III. The Court's Holding That the Suit Was Brought Against the Wrong People, Instead of Against Raney, Is Palpable Error.

The first cause of action is for defendants' breach of their contract with petitioner. Such facts are clear. Defendants are liable for their breach of their own contract—and no one else is.

It was defendants' tortious conduct that interfered with and made possible Raney's breach of his contract with petitioner. It was defendants' conduct and aid to Raney that induced Raney's breach of his contract with petitioner.

It is Hornbook law that an aggrieved party is not compelled to sue all tort feasors. He may sue one or more or all of them at his discretion. *Robert Music Corp.* v. *Alamo Music, Inc.*, 119 F. Supp. 29 (S. D. N. Y.).

The Illinois authority is *Hays* v. *Borders*, 6 Ill. 46, 65 (1844), which said:

> "The tort feasor is responsible for all the consequences growing out of his wrongful act; *Hewitt* v. *The Ontario Copper Lighting Rod Co.*, 44 U. C. Q. B. 287, 290 (1879). *The measure of damages is not confined to the loss of the services of the servant enticed away. The jury are justified in giving ample compensation for all the damages resulting from the wrongful act.*"

Where the tort was intentional, as in this case, the tort feasor's liability "is extended to include all the damages towards which his tort was the contributing cause." (*Columbia Law Review*, Vol. XXX, Feb., 1930, No. 2, p. 236. The same article holds (p. 237):

> "Most courts have held that the plaintiff in an action for wrongfully inducing breach of a contract can recover punitive damages; often granting a larger sum for punitive damages than the total amount of compensatory damages recovered." (Citing many cases).

It holds further that (p. 239):

> "The few cases which have considered the question have held that a person who has been wrongfully deprived of a contract is under no duty to the tort feasor to mitigate the damages." (Citing many cases).

Yet here, petitioner sought in every way to mitigate the damages, by attempting to sell the business at the earliest possible opportunity, and, meantime, to operate the business the best it could, with loss of competent management.

IV. Having Conspired with Petitioner's Fiduciary, Raney, in His Attempted Embezzlement of Petitioner's Property, Defendants Are Liable for Petitioner's Losses.

Defendants are liable jointly and severally for losses resulting from their conspiracy to defraud petitioner of its franchise and employees involving breaches of fiduciary duties by petitioner's officer and partner, Raney, and dealings with the fiduciary with knowledge of his wrongdoing: *Corpus Juris Sec.*, Vol. 15, pp. 996, 1004; *Jackson* v. *Smith*, 254 U. S. 586, 65 L. Ed. 418; *Irving Trust Co.* v. *Deutsch*, 73 F. 2d 121, cert. denied 294 U. S. 709; *Woodenware Co.* v. *U. S.*, 186 U. S. 279, 46 L. Ed. 1164; *Crites* v. *The Prudential Ins. Co.*, 322 U. S. 408, 64 S. Ct. 1075, 88 L. Ed. 1356; *Russel* v. *Post*, 138 U. S. 425, 34 L. Ed. 1009, holding that liability definitely attaches to one knowingly lending his aid in any way to the perpetration of a fraud. *Kernan* v. *Humble*, (La. 1899) 25 So. 431.

Perhaps the leading case on breach of fiduciary duty is *Meinhard* v. *Salmon*, 249 N. Y. 458, 468, holding that "not honesty alone, but the punctilio of honor the most sensitive is then the standard of behavior" of fiduciaries (Justice Cardoza). See also *Pratt* v. *Shell Petroleum Corp.*, 100 F. 2d 883, 22 F. Supp. 304. And if two inferences may be drawn as to whether the conduct of the agent was to the damage of his principal the inference that it was will be made. *Ashman* v. *Miller*, 101 F. 2d 85.

Duane Jones Co. v. *Burke*, 121 N. Y. S. 2d 107 (1953), is a decision nearly in point. It held that employees of a company who started their own business by a new agency, and took plaintiff's customers and breached their fiduciary duties were liable to plaintiff for loss of profits and recognized that a third person (such as defendants here) are

liable if they participate in inducing the breach of contract, especially where animated by constructive malice.

CONCLUSION.

The decision of the Court of Appeals is barren of reason. It is barren of legal or equitable authority. The legal conclusions are contradictory of the facts found. The decision is based solely on the judges' idea of philosophy and psychology.

The decision is repugnant to fundamental principles of law and equity. It attempts to insulate it from attack in this court by the broad statements, in contradiction of facts freely found, that "we find no evidence", "there is no showing", "we find no evidence of any conspiracy"—all in contradiction of the facts it found.

The decision concludes with the irrational, erroneous statement that petitioner should have sued Raney—not the defendants as the contract breaker, and not the co-tortfeasor, the defendants.

And then the Court of Appeals indulges the palpably erroneous ideology that petitioner's president and counsel necessarily appeared as a witness for petitioner, as if that were wrong. It was essential that petitioner's counsel should testify, and a litigant's counsel may testify just as freely as the litigant himself. *Hiram M. French* v. *Assyria Hall*, 119 U. S. 152, 30 L. Ed. 375 (1886).

The decision of the Court of Appeals, without reason or authority, is a travesty, and the fair administration of

justice compels the review and reversal of the unsupported, and unsupportable judgment, as matter of *law*.

THADDEUS G. BENTON,
77 Park Avenue,
New York, New York,
Attorney for Petitioner

W. M. KETCHUM,
Suite 621, 175 W. Jackson Boulevard,
Chicago, Illinois,

S. T. SUTTON,
30 N. La Salle Street,
Chicago, Illinois,
Of Counsel.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 12087 SEPTEMBER TERM, 1957, JANUARY SESSION, 1958

BOOMHOWER, INC.,
Plaintiff-Appellant
v.
H. G. FISCHER & CO., INC.
and
ALAN MATHIS,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 24, 1958

Before MAJOR, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Plaintiff, Boomhower, Inc., a Delaware corporation dealing in medical equipment, brought this action for damages against defendants, H. G. Fischer & Co., Inc. (Fischer), an Illinois corporation which manufactures and supplies such equipment, and Alan Mathis (Mathis), its president; the damages having allegedly resulted from breaches of a contract whereby plaintiff was appointed as the exclusive sales representative of the corporate defendant in the distribution of its products in Washington, D. C. and at least parts of Virginia and Maryland. The case was tried to the court without a jury, and at the conclusion of plaintiff's evidence, on defendants' motion, the court below entered its finding and judgment favorable to defendants, from which plaintiff now appeals.

Prior to October, 1950, D. W. Boomhower & Co., a business privately owned by D. W. Boomhower, acted as sales representative of Fischer in the above-mentioned area. About October, 1950, one T. G. Benton, a lawyer, organized the plaintiff corporation with his own capital and purchased the business and assets of Boomhower & Co. Benton was president of his new corporation, and Boomhower, the former proprietor, and Ed M. Raney were vice-presidents. Benton was without experience in this line of business and placed Raney in full charge of plaintiff's operations.

On October 6, 1950, Boomhower, as vice-president of plaintiff, wrote a letter to Fischer, directed to the attention of Mathis, informing them of the incorporation of plaintiff, its purchase of the Boomhower Co. business, giving the names of the officers with an account of Benton's personal background, stating that Raney would remain in full charge of the business, and requesting Fischer to write plaintiff assuring it of the continuation of "our Sales Franchise with you and your continued support and cooperation." This letter was supplemented by a second letter (undated but written about the same time) from Boomhower to defendants requesting assurance of the same dealer and cash discounts as under the former ownership, and that future advertising sent out by Fischer for this territory be under plaintiff's name.

On October 12, 1950, Fischer through Mathis as president acknowledged receipt of these two letters, offered its congratulations and best wishes for success and wrote further that "[w]e certainly expect to extend to Boomhower, Inc. all possible support and co-operation and extend to them the same discounts and terms that we have extended to D. W. Boomhower Co." Acting on this exchange of letters the parties continued the supplier-dealer arrangement

that had previously existed between Boomhower individually and Fischer. There was no formal assignment of the original contract between Boomhower & Co. and Fischer.

Sometime later (probably in March, 1951) Ed Raney wrote to defendants from his home address and referred to a conversation he had had with Mathis in Chicago in January, 1951, in which Raney had intimated that the Boomhower situation might not be satisfactory and had inquired about the possibility of taking over the Fischer franchise exclusively in the Washington, D. C. area. He wrote further that Benton had no conception of the business and had created dissension among the salesmen. He went on to say he could see a complete disintegration of the sales organization and that he thought he could take a key man or two and double the Fischer business in that area. He concluded by stating that he had available capital to handle the business and inquired whether he might have the territory exclusively for himself and take it away from the present arrangement. Raney prefaced his letter with a request that it be considered as completely confidential and at the end asked that the reply be sent to his home address.

Under date of March 27, 1951, Fischer through Mathis as president replied to Raney at his home address in Washington, D. C. to the effect that "[*i*]*f, as you state in your letter,* it appears that Boomhower, Inc. as it is presently set up bids fair to disintegrate as a proper sales force for our line and you feel that you can take over our line advantageously yourself, we, of course, are agreeable to turning our representation over to you * * *." (Our emphasis.) The letter went on to describe possible territory and concluded by saying that Fischer "will be ready to proceed along the line under discussion when we hear further from you." Raney replied on March 31, 1951, making mention of territory and inquiring about notice of cancellation to plain-

tiff, "which is only fair * * *. I certainly do not wish it to be said at any time that there was any 'scullduggery' [*sic*] in the transaction."

Raney wrote to defendants again on April 5, 1951, that "[t]his affair has become an open brawl!", discussing his sharp differences with Benton, and once more asking that the letter be kept confidential. On April 9, 1951 defendants replied that they would consider Raney for certain territory in and around Washington, D. C. and that they would want to give plaintiff about one month's notice of cancellation. In the meantime, on April 1, 1951, Raney wrote to D. W. Boomhower personally in Florida, mentioning his hostile attitude toward Benton (referring to him as "the Attorney"), and inviting Boomhower to furnish $5,000 capital for a new corporation Raney proposed to form and personally control to take over the Fischer business from plaintiff. However, Boomhower declined to participate.

About this time Benton demanded that Raney "turn in his keys" and on April 11, 1951 Raney resigned and left plaintiff's service and shortly thereafter went to work for Fischer. Dennis Kane succeeded Raney with plaintiff and worked until late July, 1951. Kane was followed in order by two of plaintiff's salesmen and none of them appears to have been successful. Plaintiff continued to represent Fischer and subsequently the parties executed a formal contract effective October 5, 1951. Finally Fischer canceled plaintiff's contract on April 25, 1952.

It appears that Raney could not raise capital to organize his proposed dealer corporation and Fischer never granted him any franchise. Plaintiff was succeeded as the Fischer dealer by the District X-Ray Company headed by Kane and others.

Plaintiff seeks to recover $36,592 as damages under three separate and alternative theories or causes. The first

cause charges that defendants breached the Fischer contract with plaintiff by conniving with Raney in his attempt to appropriate the franchise for his own use. The second cause charges that defendants maliciously interfered with Raney's three-year contract of employment to manage plaintiff's business. The third cause is in trespass on the case charging that defendants conspired with plaintiff's fiduciary (Raney) to take away its property rights under its contracts with Fischer and give them to Raney.

Since the court below sustained defendants' motion for a finding in their favor at the close of plaintiff's evidence, the contested issues here relate primarily to the sufficiency of the evidence: Whether it establishes a breach by defendants of any contractual duties owed by them to plaintiff, and whether it sustains plaintiff's claim that defendants deliberately interfered with the contract of employment between plaintiff, as employer, and Raney, as employee, or conspired with Raney to enable him to embezzle plaintiff's franchise.

After an examination of the entire record we are satisfied that the evidence is wholly insufficient to sustain plaintiff on any of its theories of recovery. In this connection it should be pointed out that plaintiff has sued Fischer and its president, Mathis, and has elected not to sue Raney. We find no evidence that defendants breached any of their contractual obligations to plaintiff as defined either in the October, 1950 exchange of letters or as formally set out in the contract of October, 1951. Likewise, there is no showing that defendants interfered with Raney's contractual employment with plaintiff, or that defendants ever knew anything about the terms of any such agreement. Similarly, we find no evidence of any conspiracy between defendants and Raney to enable Raney to embezzle plaintiff's franchise and steal plaintiff's employees. It is quite apparent

from the transcript of these proceedings that Raney and plaintiff had an unhappy and unprofitable alliance. It is also clear that Raney wanted the franchise for himself, but defendants never gave it to him. Raney did leave plaintiff and take employment with defendants but only after Benton asked for his keys. The district court aptly said, "It would appear to me that this lawsuit has been brought against the wrong people."

This would appear to be one of those unfortunate situations where a lawyer puts his money into a business in which he has had no experience; has an unhappy result and at least four unsuccessful managers; concludes he has been defrauded by a trusted associate but sues someone else; acts as trial and appellate counsel for his own plaintiff corporation; and feels compelled to testify as a witness in his own behalf. It all adds up to a situation to which he can never become reconciled.

Since this appeal turns solely on the sufficiency of the evidence and having found against appellant on that issue, we hold that the district court did not err in its finding favorable to defendants.

The judgment below is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.